Supreme Court, U.S.
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(3)

No. 91-1800

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

IN RE: HARLOW FAY, INC.,

Debtor.

HARLOW FAY, INC.,

Petitioner,

v.

FEDERAL LAND BANK OF
ST. LOUIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Petitioner, Harlow Fay, Inc., respectfully requests this Court to grant its Petition for Writ of Certiorari and to reject the arguments in the Brief In Opposition filed by Respondent, Federal Land Bank of St. Louis.

INTRODUCTION

The outline of this case presented by Respondent in its brief is not only garbled but very misleading and inaccurate. Suffice to say, that by repeating selected alleged facts over and over, Respondent hopes to prejudice this Court to the belief that the Petition at bar should be ignored because of a pattern of untimeliness and delay. The tactic is not worthy and violates this Court's rules.

While the merits of the dismissal of this case by the bankruptcy court is not at issue here (that is for the District Court sitting on appeal to address), some background is necessary for this Court to appreciate what is at stake and to be reassured that Petitioner has a meaningful cause below.

In reply to the Respondent's

erroneous recital of purported facts, Petitioner attaches as a further appendix the Order of the Bankruptcy Court dismissing the case and Debtor's Motion For Leave To File Modification Instanter with Affidavit.

Suffice to say, in Petitioner's view, the delay in proposing the modifications in the bankruptcy court was fully justified, as explained in Debtor's Motion For Leave To File . . . with Affidavit, attached herto as A 67 et seq.).

Typical of Respondent's distortions and inaccuracies is its restatement of the "central issue" at page 6 of its Brief -- i.e. "whether these two Courts [bankruptcy and District] abused their discretionary powers by dismissing the Appeal of Appellant- Petitioner."

First of all, the District Court dismissed Petitioner's appeal, and the

bankruptcy Court dismissed the case.

The main legal issues presented at bar are (1) does the standard of good faith or good cause shown apply or is "excusable neglect" the standard for filing untimely briefs, and (2) are the Petitioner's reasons sufficient to meet the standard, whatever it may be.

REPLY TO RESPONDENT'S ARGUMENT

I. Respondent Ignores The Conflict of Decision At Bar.

Far from being narrow and unique to this case, the action of the Eighth Circuit in endorsing excusable neglect as the standard for filing late bankruptcy appeals briefs (a standard more rigid and unforgiving than the rule by which it operates), will surely be generally applied in that Circuit. (See pages 41-42 of the Petition to the effect that the provisions for enlarging time in the

Appellate Court are set forth in FRAP 31c and 26(b) (A 62); that the standard is not excusable neglect but rather either good faith or "good cause shown.")

Of course, no other circuit would endorse an incongruous and erroneous standard of excusable neglect for late filing of briefs, and there are thus no other circuits which impose that standard. It is accordingly urgent and compelling that this Court intervene before such an erroneous standard gains currency in the Eighth Circuit.

Respondent erroneously states at page 11 of its brief that

> "Appellant-Petitioner claims that the Opinion of the Court of Appeals is in conflict with Harrison v. First Bank, 823 F. 2d 1310 (8th Cir. 1987)."

The Petitioner neither cites nor relies on a case called Harrison. Petitioner has distinguished a case

called Hanson v. First Bank of South Dakota, 828 F. 2d 1310 (8th Cir. 1987). That case does not involve turn over of staff in a lawyer's office. It involves a turnover of staff which prevented the creditor, Sperry-New Holland, from timely filing its ballot accepting debtor's plan. The standard of excusable neglect was applied because a bar date was involved. The unjust and Draconian result was the needless liquidation of a farmer simply because another creditor had filed a liquidating plan. The bankruptcy court forgot that it could relieve this situation under the provisions of 11 U.S.C., sec. 105 (the Bankruptcy Code) by simply ordering a re-balloting in the interests of equity and justice and to forward the purpose of the Code in achieving reorganizations and preventing liquidations. However, the

Hanson court did admit that the excusable neglect standard was a flexible one, and Petitioner at bar has demonstrated that it could qualify for relief even under that high standard. Petition, p. 32-35,38.

While it is true that only one deadline was missed in Hanson, it was a bar date, not a briefing date.

It is not true that "many deadlines were missed" below. According to the calculations of the Respondent only one "deadline" on appeal was missed. That of April 17, 1989. (See Respondent's Brief, p. 2-3). If the fourth application for extension of time to file brief for two weeks until April 31 (i.e. May 3), 1989 was ineffective, then the only deadline missed was April 17, 1989 and the Court should have allowed the brief to be filed instanter two weeks late. The fourth

application for extension, however, effective or not, demonstrates diligence, and should not be ignored. It is undisputed that Appellant's brief was originally due in the District Court on February 22, 1989. It was mailed for filing on May 3, 1989 (and according to rule would be deemed filed on that date if timely).

The District Court had no difficulty, according to the calculations of Respondent, in granting extensions to and including April 17, 1992. What possible prejudice a 16-day further extension could provide has never been explained by Respondent. Had Petitioner asked for one 45-day extension and another 30-day extension, the District Court, under the circumstances, could not properly have denied the extra time--for it surely would have been required to grant that

amount of time to new counsel had Mr. Needler been unable to proceed.[1] Then there would not have been "FOUR" extensions to complain about.

Petitioner does not understand what is meant by the Respondent's unsupported and unexplained contention at page 4 of its brief that Petitioner has failed to follow the Rules regarding preparation of the Record and Appendix in this case.

As this Court well knows, in the event certiorari is granted, this Court will enter an order requiring the record to be conveyed to it. If the Respondent is referring to the appeal below, should there be any record deficiency on remand, the matter can be easily corrected by

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[1]Clearly, Mr. Needler would have been unable to proceed in any of the cases he was handling had he been forced to strictly comply with briefing and other schedules.

bringing forward those parts of the record not designated --in the event that something has been erroneously or improvidently left behind. Respondent does not say precisely what is not of record.

Petitioner does not understand Respondent's references to "Appellant-Petitioner's App._ _," as they do not refer to the Petition or Appendix at bar.

Federal Rule of Civil Procedure 6 and/or General Bankruptcy Rule 9006 should not apply to this case. The Bankruptcy Appeals rules should apply to this case, particularly Rule 8009(a), which without restriction specifically allows the District Court, by order, to set "different time limits" for briefs. The Rule is patterned after FRAP 31(c) which similarly allows time for briefing to be extended without restriction.

This Court should not be misled by cases cited by the courts below and Respondent which impose the excusable neglect standard in situations where bar dates are missed -- e.g. notice of appeal. Extensions for filing a notice of appeal in the District Court are governed by FRAP 4(a)(5) and not FRAP 31c and 26(b). Extensions for filing a notice of appeal in the Bankruptcy Court are governed by Bankruptcy Rule 8002(c) and not Bankruptcy Rule 8009(a). Accordingly, such cases as Selph v. Council of Los Angeles, 593 F. 2d 881 (9th Cir. 1979) have nothing to do with the issues here. But, it is to be noted that even under the rigid standard outlined in Selph, the Petitioner should succeed in gaining relief. This Court has stated that on a showing of "unique circumstances" a party will be permitted an otherwise untimely

appeal. Wolfsohn v. Hankin, 376 U.S. 203, 84 S. Ct. 699, 11 L. Ed. 2d 636 (1964).

There are no more unique circumstances than a law firm being unable to continue on as it is presently constituted and having to reduce itself to one man. The public interest demands relief in such a case to prevent prejudice to clients.

Again, at page 12 of Respondent's brief, counsel makes the false contention that Hanson v. First Bank of South Dakota 828 F. 2d 1310 (8th Cir. 1987) holds:

> ". . . employee turnover such as attorney Needler complains of does not constitute excusable neglect and is considered well within the reasonable control of the attorney responsible for preparation of a Brief."

Hanson has nothing to do with briefs, lawyers' employees, or the mistake or

neglect of an attorney.

Respondent claims that it cannot understand the significance of the 28 cases which Petitioner's attorney dealt with between April 25 and May 2, 1989. As stated in Mr. Needler's Affidavit, Petition, A 39-41, the transcript from the court reporter was not received until April 22, 1989. The brief could not be submitted until this transcript was reviewed. Obviously a further extension of time until April 31 (May 3) was justified and was needed to finish the brief considering Mr. Needler's work load. Attorney Needler also states that this was a typical workload since closing of the Chicago office on February 15, 1989.

Moreover, had the clerk of the bankruptcy court not docketed the appeal until she received the transcript (as

promised), there would have been no problem, for the case would have been docketed on or around April 22, and the brief, by the rules, would have been due on May 7, 1989 (and timely filed on May 3, 1989). See In re Beverly Manufacturing Corp. (Brake v. Tavormina), 778 F.2d 666 (11th Cir. 1985).

Typical of Respondent's arguments is this garbled non-sequitur:

> "The argument of Appellant-Petitioner that no case where the "excusable neglect" standard is applied to the untimely filing of Appellant's Brief may be due to the fact that jurisdictional requirements mandate a motion be before the Court to allow the filing of a late Brief.

Petitioner does not know precisely what is meant by this, but suffice to say the District Court considered and denied the Petitioner's Motion for Further Extension of Time on the ground that

excusable neglect was not shown. (Petition, A 13). If this "Fourth Motion" did not somehow qualify as a Motion To File (on some unstated and unsupported "jurisdictional" ground, then Petitioner's Motion To Reconsider, which specifically requests permission to file the brief instanter, certainly did (Petition, A 31-32). In any event, the filing of briefs is not jurisdictional. In re Beverly, supra, at 667. Nor, does any of the above have any relevance whatsoever to the fact that no other Circuit imposes a strict and high standard of excusable neglect on the late filing of briefs.

The above is simply Respondent's confession that it can find no case which applies the "excusable neglect standard" to the late filing of briefs, except the one at bar. In particular, the 5th Circuit, upon which the Respondent relies

does not apply such a standard. See Phillips v. Employers Mut. Liability Ins. Co., 239 F. 2d 78, 80 n.2 (5th Cir. 1956) holding that the late filing of briefs is a "non-jurisdictional" defect insufficient to warrant dismissal."

II. The District Court Clearly Erred in Applying the Wrong Standard for Late Filing of Briefs And Abused Its Discretion In Applying the Standard It Did.

Again, Petitioner has no idea what the Respondent means by

> "His complaint fails to take into consideration that the Brief he ultimately lodged with the Court failed even to satisfy the final, prayed for extension!" (Res. Brief, p. 18).

Of course, the brief filed in the District Court did not address the timeliness of its submission because it was thought on May 3, 1989 that the Petitioner's "fourth" motion for extension would be granted and the brief

filed. Petitioner could not conceive that two days hiatus in filing a fourth motion for extension or an meaningless and obvious technical mistake of requesting a non-existent date would have any relevance whatsoever (i.e. if Petitioner knew at the time that such a mistake had been made).

Also, Respondent claims that

> "His complaint also fails to show any abuse of discretion by the District Court." (Res. Brief, p. 18)

Petitioner has demonstrated that the District Court clearly erred in applying the wrong standard of excusable neglect and further abused its discretion in not allowing the late filing of brief, even were this the standard.

III. If Certiorari Is Granted, This Court Will Not Be Considering The Merits of the Dismissal In The Bankruptcy Court As That Is A Matter for The District Court On Remand.

Respondent claims that "Appellant-Petitioner" cannot prevail in this Court because it has failed to supply a sufficient record which supports an "attack" on the orders of the bankruptcy court and District Court. The orders of the bankruptcy court are not here at issue, and this Court, if certiorari is granted, will be issuing an order requiring the record in the Court of Appeals to be conveyed to it. (See Rule 16.2).

It is the desire of the Petitioner, Harlow Fay, Inc., to reorganize around its present assets. Simply because the Federal Land Bank satisfied its loan through foreclosure does not mean that the other creditors should be denied the benefits of a reorganized Harlow Fay, Inc. This action therefore is not moot.

Since counsel for petitioner has presented affidavits below, and/or has

further explained his disabilities in the hearings involved it is untrue that counsel's "excuses" are not of record.

One page after declaring that Petitioner's "excuses" are not a matter of record, Respondent concedes that these same excuses were "presented to and ruled upon by the Courts below." (Res. Br., p. 24-25).

It is also untrue that the Petitioner never submitted a coherent modification of the plan. The written Revised Modification, dated December 11, 1988 and presented to the bankruptcy court on December 13, 1988, and attached to Petitioner's brief in the District Court, is clear and speaks for itself.

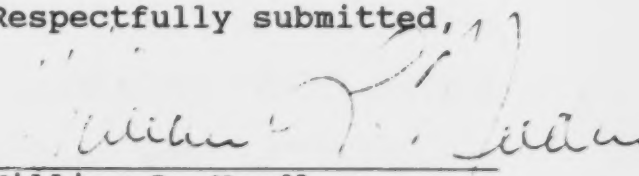
The Bankruptcy Court expressly found that before it on December 13, 1988 was "Debtor's Motion to Modify Note, Motion D, filed October 12, 1987, as amended by

Debtor's proposed Modification of December 13, 1988. The Bankruptcy Court, moreover, considered the revised modification of the Plan and determined that "circumstances in this case do not warrant such modification." (A 65-66, attached hereto."

CONCLUSION

Petitioner requests this Court to grant its Petition and the relief stated therein.

Respectfully submitted,



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FURTHER APPENDIX

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

In Re:	)	
	)	
HARLOW FAY, INC.,	)	Case No.
	)	85-00119(N)
Debtor.	)	

ORDER OF DISMISSAL

This matter is before the Court on the Motion of The Federal Land Bank of St. Louis to Dismiss, Motion No., C, filed July 20, 1987, and on Motion 06, being the Motion for Relief from the Automatic Stay of Farm Credit Bank of St. Louis as successor to the Federal Land Bank of St. Louis, filed October 3, 1988, and on the Debtor's Motion to Modify Note, Motion D, filed October 12, 1987, as amended by Debtor's proposed Revised Modification of December 13, 1988. The Court finds that Debtor is in material

default with respect to a confirmed Plan under 11 U.S.C., Section 1112(b)(8) of the Bankruptcy Code. The Court further finds that the proposed modifications of Plan by Debtor fail to meet the requirements of 11 U.S.C. Section 1127 of the Bankruptcy Code, that the Revised modifications of December 11, 1988 and December 13, 1988 were not timely filed within the time fixed by the Court and that circumstances in this case do not warrant such modification.

IT IS THEREFORE ORDERED that Motion D, Debtor's Motion to Modify Note and the revised Modification of December 13, 1988 is denied. IT IS FURTHER ORDERED that Motion C, the Motion to Dismiss of The Federal Land Bank of St. Louis is granted and this Chapter 11 proceeding is dismissed.

David P. McDonald
U.S. Bankruptcy Judge
Dated: December 13, 1988

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

IN RE:	)	Case No.
	)	85-00119(N)
HARLOW FAY, INC.,	)	Proceedings for
	)	Reorganization Of
	)	A Farmer Under
Debtor.	)	Chapter 11

MOTION FOR LEAVE TO FILE MODIFICATION INSTANTER

NOW COMES William L. Needler and Associates, Ltd., on behalf of the above Debtor and requests leave to file Revised Modification Instanter.

In support hereof, the debtor states as follows:

1. That on the 15th of November, extensive hearings were held on Motions for Relief, Motions to Compel, etc.;

2. Settlements read on the record

were made that day resolving the FmHA claim, the Mutual Benefit Claim and the Claim of the Brookfield Bank of Purdin;

3. In addition, the Debtors agreed to immediately pay funds to FmHA and to the Federal Land Bank of St, Louis (hereinafter "FLB"), these payments were made as represented to the Court on the record.

4. This Court ordered that the Stipulation and Agreement as to settlement with both FmHA and Mutual Benefit be served by Debtors counsel on all creditors and interested parties which was accomplished by mail on the 22nd of November, 1988;

5. Subsequent to this changes in the original Stipulation and Order were agreed upon between the parties and only received from Mutual Benefit by Debtor on

December 9th which revised Stipulation is being served contemporaneously herewith on all the parties.

6. The Debtor at this November 15, 1988, hearing expressed hope that now that all major claims except for the FLB had been settled , that settlement with FLB could be accomplished before the hearing set for hearing on any objections to settlements with FmHA and Mutual Benefit on December 13th, 1988 at 1:30 in Hannibal, Missouri

7. This Court ordered Plan Modification to be filed within three weeks which would have been on the 6th of December, 1988.

8. Early last week the Debtor conveyed a settlement offer to FLB which offer is incorporated in the revised modification. Also the revised

stipulation with Mutual Benefit is incorporated in these revisions also.

9. The Debtor could not meet the December 6, 1988 filling date because of this new offer to FLB, the revisions to Mutual Benefit Stipulation and other scheduling problems and has attached an affidavit of explanation hereto.

WHEREFORE, Debtor requests leave to file Revised Modification dated December 11, 1988 instanter there being no material disadvantage to interested parties by this delay of 6 days;

The Affidavit attached is expressly made a part of this and is incorporated herein as if separately stated above.

Respectfully submitted,

_____
William L. Needler
One of Debtors Attorneys

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

IN RE:	) Case No.
	) 85-00119(N)
HARLOW FAY, INC.,	) Proceedings for
	) Reorganization
	) Of A Farmer Un-
Debtor.	) der Chapter 11.

AFFIDAVIT

COUNTY OF COOK)
) SS
STATE OF ILLINOIS)

WILLIAM L. NEEDLER, on oath deposes and says that:

1. That affiant is Counsel of Record with local counsel Jackie Bailey

of Marceline, Missouri;

2. That affiant could not file revised modification without changes for Federal Land Bank which because of trial schedule of Affiant in North Platte, Nebraska, phone calls between affiant and affiants office in Nebraska and Chicago were not completed until 12:30 p.m. [o]n Friday the 9th of December 1988;

3. On Friday, the 9th of December, 1988, this Affiant was informed by the principal officer of the debtor, John Fay, that he had received Federal Land Banks recent land appraisal and had made an offer based on this proposal. This treatment has been placed in the December 11, 1988 revised modification;

4. On December 6, 1988, affiant was scheduled for a valuation hearing preliminary to confirmation i[n] North

Platte, Nebraska in Chapter 11 87-1486 before Timothy J. Mahoney and this case was settled after marathon meeting from 9:00 a.m. Monday morning through 10:30 a.m. Tuesday the 6th and the hearings concluded on the morning and afternoon of Wednesday the 6th of December, 1988.

5. Affiant could not reach Debtor on the 7th of December,1988;

6. A cash collateral hearing and settlement discussion on the 8th in Lincoln, Nebraska before Judge Minahan in In Re: Harold Henry, Case No. 88-40282 was not concluded until the afternoon at 2:00 p.m. on the 7th;

7. This affiant upon his return to Chicago was informed on the 9th of December that the revision in the Modification of December 11, 1988 for the Federal Land Bank was conveyed by Mr.

John Fay, Officer of the Debtor to Mr. Joe Ricahrdson, local officer of the Federal Land Bank so that they are now informed of the particulars of this modification;

8. Affiant could not read the Revised Modification to John Fay until the 11th; (Mr. Fay being unavailable prior to that).

9. Affiant does not believe this six day delay to be detrimental to the interested parties involved namely the FmHA, Mutual Benefit Brookfield Purdin and/or the Federal Land Bank of St. Louis;

10. This affiant would request that leave be granted to file revised modification and that he believes this delay necessary to include proper and approved treatment of the Federal Land

Bank together with the revisions to Stipulation with Mutual Benefit;

11. The affiant if called upon would testify to the truth of the above facts under oath before this Court;

12. Further affiant sayeth naught.

_____
William L. Needer

SUBSCRIBED and SWORN TO
before me this 11th
day of December, 1988.

/s/Hugh Dunlop, Jr.
Notary Public